

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
March 20, 2007 Session

**BELLA I. SAFRO v. JAMES E. KENNEDY, ET AL.**

Appeal from the Circuit Court for Knox County  
No. 3-428-05     Wheeler A. Rosenbalm, Judge

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**No. E2006-01638-COA-R3-CV - FILED APRIL 25, 2007**

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Plaintiff Bella I. Safro brought this action alleging malicious harassment and defamation against James E. Kennedy, a Food City security guard, and Mr. Kennedy's employer. In granting the Defendants' motion for summary judgment, the trial court held: (1) that the undisputed facts established that Mr. Kennedy did not unlawfully intimidate Ms. Safro from the exercise or enjoyment of a constitutional right by injuring or threatening to injure her, and therefore her malicious harassment claim must be dismissed; and (2) that Ms. Safro failed to establish that Mr. Kennedy's slanderous statements were published to a third person, and therefore her defamation claim must be dismissed. We affirm the trial court's dismissal of the malicious harassment claim, but find there are genuine issues of material fact as to whether Mr. Kennedy's defamatory remarks were published to a third person and as to whether Ms. Safro incurred injury resulting from Mr. Kennedy's statements. We vacate the trial court's dismissal of the defamation claim and remand for a jury trial on this issue.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Vacated in Part; Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Bella I. Safro, Knoxville, Tennessee, *pro se* Appellant.

Howard B. Jackson and T. Joseph Lynch, Knoxville, Tennessee, for the Appellees, James E. Kennedy and K-VA-T Food Stores, Inc. d/b/a Food City.

**OPINION**

***I. Background***



On February 17, 2005, Ms. Safro, a Knoxville attorney, entered a Food City store with her client Volodymyr Orlovskyy in an attempt to find Mr. Orlovskyy's lost health insurance prescription card. Two days earlier, Mr. Orlovskyy had been involved in an altercation with Mr. Kennedy at the same Food City store, culminating in Mr. Orlovskyy's arrest for shoplifting.<sup>1</sup> Mr. Kennedy confronted Ms. Safro and Mr. Orlovskyy upon their entry, telling Mr. Orlovskyy "you're not supposed to be here" and requesting him to leave immediately.

A heated discussion ensued between Ms. Safro and Mr. Kennedy. Ms. Safro alleges that in the course of that incident, Mr. Kennedy loudly and repeatedly made the following comments: "you are nothing; you are an ambulance chaser;" "your clients are garbage;" "your clients are thieves;" "you protect thieves;" "go chase an ambulance;" and "get out, ambulance chaser." Ms. Safro, who is a native of Russia and speaks with an accent, further alleges that Mr. Kennedy told her "you better go back to where you came from. To Mexico or other such hell. Nobody wants you here."

Ms. Safro filed this lawsuit against Mr. Kennedy and K-VA-T Food Stores, Inc. d/b/a Food City, alleging, among other things, that Mr. Kennedy's conduct constituted malicious harassment in violation of Tenn. Code Ann. § 4-21-701, and defamation. After discovery, both sides moved for summary judgment. The trial court granted the Defendants summary judgment on all claims.

## ***II. Issue Presented***

Ms. Safro appeals, raising the issue, as restated, of whether the trial court erred in granting the Defendants summary judgment on her claims of malicious harassment and defamation.

## ***III. Standard of Review***

Summary judgment is appropriate only when the moving party demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. The burden of proof rests with the moving party, who must establish that its motion satisfies these requirements. *Staples v. CBL & Associates, Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000). If the moving party makes a properly supported motion, the burden shifts to the nonmoving party to establish the existence of disputed material facts. *Id.* (citing *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)). The nonmoving party may not simply rely upon the pleadings, but must instead set forth specific facts, by affidavits or other discovery materials, demonstrating the existence of a genuine issue of material fact for trial. *Byrd*, 847 S.W.2d at 211. The Supreme Court has emphasized that "genuine issue" in this context "refers to genuine factual issues and does not include issues involving legal conclusions to be drawn from the facts." *Id.* (citing *Price v. Mercury Supply Co.*, 682 S.W.2d 924, 929 (Tenn. Ct. App. 1984)).

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<sup>1</sup>Mr. Orlovskyy eventually pleaded guilty to the shoplifting charge.



The standards governing the assessment of evidence in the summary judgment context are well established. Courts must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor. *See Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997); *Byrd*, 847 S.W.2d at 210-211. Summary judgment is appropriate only when the facts and the inferences to be drawn from the facts permit a reasonable person to reach one conclusion. *See McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Because a trial court's decision to grant a motion for summary judgment is solely a matter of law, it is not entitled to a presumption of correctness. *See Staples*, 15 S.W.3d at 88; *Carvell*, 900 S.W.2d at 26. Consequently, our task is to review the record to determine if the requirements of Rule 56.04 of the Tennessee Rules of Civil Procedure have been met. *Staples*, 15 S.W.3d at 88.

#### ***IV. Analysis***

##### ***A. Malicious Harassment***

Ms. Safro alleges a claim for damages for malicious harassment under the Tennessee Human Rights Act (“THRA”), Tenn. Code Ann. § 4-21-701, the elements of which are derived from the criminal offense of civil rights intimidation under Tenn. Code Ann. § 39-17-309. *Washington v. Robertson County*, 29 S.W.3d 466, 468 (Tenn. 2000). Tennessee Code Ann. § 4-21-701 reads as follows:

- (a) There is hereby created a civil cause of action for malicious harassment.
- (b) A person may be liable to the victim of malicious harassment for both special and general damages, including, but not limited to, damages for emotional distress, reasonable attorney's fees and costs, and punitive damages.

*Id.* The companion statute to the civil claim of malicious harassment, Tenn. Code Ann. § 4-21-702, provides as follows:

The remedy for malicious harassment provided in this part shall be in addition to, and shall not preclude victims from seeking, other remedies, criminal or civil, otherwise available under the law.

*Id.*

The claim of malicious harassment is found within the THRA, which addresses discrimination based on race, creed, color, religion, sex, gender, or national origin. *See* Tenn. Code Ann. § 4-21-101, *et seq.* A claim of malicious harassment “requires not only that a person acted maliciously, *i.e.*, [with] ill-will, hatred or spite, but also that a person unlawfully intimidated another



from the free exercise or enjoyment of a constitutional right by injuring or threatening to injure or coercing another person or by damaging, destroying or defacing any real or personal property of another person.” *Washington*, 29 S.W.3d at 473; *see also* Tenn. Code Ann. § 39-17-309(b).

In *Surber v. Cannon*, No. M1998-00928-COA-R3-CV, 2001 WL 120735 (Tenn. Ct. App. M.S., Feb. 14, 2001), this court concluded that in order to be actionable under Tenn. Code Ann. § 4-21-701, malicious harassment must be based on the victim's “race, color, ancestry, religion or national origin.” *Id.* at \*6; *accord Levy v. Franks*, 159 S.W.3d 66, 80 (Tenn. Ct. App. 2004); *Davis v. Tennessee Wildlife Resources Agency*, No. W2005-00406-COA-R3-CV, 2006 WL 861352, at \*5 (Tenn. Ct. App. W.S., Apr. 5, 2006); *Harvey v. LaDuke*, No. E2005-00533-COA-R3-CV, 2006 WL 694640, at \*10 (Tenn. Ct. App. E.S., Mar. 20, 2006).

The conduct Ms. Safro alleges is actionable consists of Mr. Kennedy’s statement “you better go back to Mexico or other such hell,” which she asserts was made because of her national origin (which is, as previously stated, Russian), and also Mr. Kennedy’s alleged nonverbal threatening conduct toward her. Accepting Ms. Safro’s allegations as true for summary judgment purposes, however, she has not established that Mr. Kennedy intimidated her from the free exercise or enjoyment of a constitutional right, a required element of the statutory malicious harassment claim. *Washington*, 23 S.W.3d at 473.

Further, a malicious harassment claim requires a showing that, among other things, the defendant intimidated the plaintiff by (1) injuring or threatening to injure the plaintiff; or (2) coercing another person to do so; or (3) damaging, destroying or defacing any real or personal property of another person. *Id.* Ms. Safro has not alleged coercion of another person nor damage to property in this action. She relies on her allegation that Mr. Kennedy threatened to injure her by his statements and body language during the Food City incident. However, in her deposition Ms. Safro testified as follows:

Q: You said earlier that Mr. Kennedy made a move in you all’s direction. Can you describe more specifically what you mean by that?

A: He made a step or two towards us, his fists were clenched, he had his sleeve shirts (sic) rolled up, he had a tattoo on his forearms, on both his forearms, and he looked threatening to me.

Q: *Did he make any comment that threatened injury?*

A: *He didn’t make any verbal comment to that effect.*

(Emphasis added).



In support of her motion for summary judgment, Ms. Safro introduced two video clips from Food City surveillance cameras that show the majority of the roughly ten-minute encounter between the parties. The clips provide soundless video only. A careful viewing of the video clips does not reveal any physical conduct or body language on Mr. Kennedy's part that could objectively be described or construed as threatening. Although we do not condone or find appropriate Mr. Kennedy's alleged behavior, we are of the opinion that it does not rise to the level of sustaining a legal cause of action for malicious harassment. We affirm the trial court's judgment dismissing the malicious harassment claim.

### ***B. Defamation***

This case involves a claim for slander, which is a form of defamation.<sup>2</sup> In *Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 820 (Tenn. 1994), the Tennessee Supreme Court noted that the basis for an action for defamation, whether it be slander or libel, is that the defamation has resulted in an injury to the person's character and reputation. It is well established that in order to establish a *prima facie* case of defamation, a plaintiff must show that: "1) a party published a statement; 2) with knowledge that the statement is false and defaming to the other; or 3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement." *Sullivan v. Baptist Memorial Hospital*, 995 S.W.2d 569, 571 (Tenn. 1999).

The trial court stated, "I don't have any trouble with the conclusion that calling a lawyer an ambulance chaser is a defamatory remark," and the Defendants do not take issue with this conclusion on appeal. The Defendants argue that Ms. Safro did not establish that the defamatory statements made by Mr. Kennedy were "published" in this case. As noted by the Court in *Sullivan*, "'Publication' is a term of art meaning the communication of defamatory matter to a third person." *Id.* at 571; *see also Trotter v. Grand Lodge F. & A.M. of Tennessee*, No. E2005-00416-COA-R3-CV, 2006 WL 538946, at \*4 (Tenn. Ct. App. E.S., March 6, 2006). The parties do not dispute that Ms. Safro's client, Mr. Orlovskyy, heard the statements. But the Defendants argue that the statements were not effectively "communicated" to Mr. Orlovskyy because his understanding of English is limited to the extent that he did not understand their meaning. Ms. Safro filed Mr. Orlovskyy's affidavit, in which he stated the following:

1. On February 17, 2005, Ms. Bella Safro, my attorney, and I went to Bearden Food City store to look for my prescription card and ask if anybody had seen it.

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<sup>2</sup>Ms. Safro also alleges that the International Covenant on Civil and Political Rights ("ICCPR"), an international treaty signed and ratified by the United States, is applicable to this case. However, she states in her brief that she "does not seek an independent remedy under the international treaty; her claim is based on a tort that has long been recognized under the Tennessee law." While we have no quarrel with the ICCPR, we believe it is of limited, if any, relevance to the present defamation case.



2. In the store, we encountered James Kennedy, a store security person, who started making movements with his hands indicating that we needed to leave.
3. Kennedy looked very agitated and I understood from his movements that he wanted us to leave.
4. I heard Kennedy repeatedly say, "ambulance chaser," while looking at Ms. Safro.
5. Looking at Kennedy and Ms. Safro, I understood that Kennedy was saying something insulting.
6. I looked at Ms. Safro and she looked helpless.
7. I also heard Kennedy say, "go back to Mexico," addressing me and Ms. Safro, as we were moving toward the exit.
8. Kennedy said the phrase "Go back to Mexico" with malice in his voice.
9. To the best of my recollection, Kennedy said the phrase "Go back to Mexico" two or three times.
10. As we were driving away from Food City, I remember saying to Ms. Safro, "That man claimed to be an officer and he just insulted you."
11. I remember telling my wife about the events of February 17 at Food City.

A partial transcript of Mr. Orlovskyy's deposition, taken with the aid of a translator, is also included in the record. We find that while Mr. Orlovskyy's testimony, including his affidavit quoted above, does not conclusively establish that he both heard and understood the defamatory statements, it is sufficient to raise a jury question as to whether he did.

Further, there is a genuine issue of material fact as to whether the statements were published to other nearby patrons in the grocery store. Ms. Safro alleges that Kennedy's statements were made in a loud and clearly audible voice and were heard by Food City personnel and store patrons. Mr. Orlovskyy testified that "there were a lot of people and we were in the middle of the store." Ms. Safro agreed that there were many people in the store and that some were nearby during the discussion. She further testified as follows:

Q: So far as you know, did anyone hear the conversation other than the three of you?



A: I remember people turning their heads as they were walking by, because Mr. Kennedy was quite loud. I imagine people who turned their heads did hear it.

Q: Do you have the name of an individual that you believe heard this conversation?

A: I do not.

The Defendants argued to the trial court that Ms. Safro “admits...that she cannot point out any individual customer who both heard and understood the statement[s].” However, Ms. Safro, as the party opposing summary judgment, is entitled to “all reasonable inferences in the nonmoving party's favor.” *See Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997); *Byrd*, 847 S.W.2d at 210-11. While the surveillance video clips do not reveal what the parties are saying, they do show store patrons in the immediate area while the conversation is happening. The evidence raises a reasonable inference that nearby third parties in the store heard Mr. Kennedy’s defamatory comments. Additionally, Ms. Safro was wearing a large name badge with her name and identification as an attorney while she was in the store and allegedly being loudly called an “ambulance chaser.” We hold that she has provided evidence raising a genuine issue of material fact and is entitled to have the question of whether the statements were in fact published decided by a jury.

We reach the same conclusion regarding the issue of Ms. Safro’s damages. In the case of *Handley v. May*, 588 S.W.2d 772 (Tenn. Ct. App. 1979), this court stated the following regarding damages in a defamation action:

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the case followed by the Tennessee Supreme Court in [*Memphis Pub. Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978)], abolishing the *per se* / *per quod* distinction, states as to the actual damage requirement:

It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define “actual injury,” as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by



competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury. 418 U.S. at 350-1, 94 S.Ct. at 3012.

Failure to prove special damages or out-of-pocket loss is not necessarily determinative. The issue is whether the record contains any material evidence of the types of injury outlined in *Gertz*. If there is material evidence on any of the elements of damages, the cause must be submitted to the jury.

*Handley*, 588 S.W.2d at 776.

Ms. Safro has alleged that she has suffered “anguish, severe emotional distress, anxiety and loss of sleep,” in addition to a general injury to her reputation and standing as a lawyer, particularly among the Russian-speaking community in the Knoxville area, because of the alleged publication of Mr. Kennedy’s alleged statements to Mr. Orlovskyy and the store patrons. Based on the record before us and under the circumstances presented in this particular case, we hold that the issues of whether Ms. Safro suffered injuries, and if so, the extent of those injuries, are for the jury to decide.

#### ***V. Conclusion***

For the aforementioned reasons, the judgment of the trial court dismissing Ms. Safro’s malicious harassment claim is affirmed. The judgment of the trial court dismissing Ms. Safro’s defamation claim is vacated, and the case remanded for a trial of the defamation claim on the merits. Costs on appeal are assessed one half to the Appellant, Bella I. Safro, and one half to the Appellees, James E. Kennedy and K-VA-T Food Stores, Inc. d/b/a Food City.

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SHARON G. LEE, JUDGE